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In the Supreme Court of the United States

MICHAEL ROSS,

Petitioner,

v.

SHAIDON BLAKE,

Respondent.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

BRIEF OF *AMICI CURIAE* STATE OF WEST VIRGINIA AND 38 OTHER STATES IN SUPPORT OF PETITIONER

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QUESTION PRESENTED

Did the Fourth Circuit misapply this Court's precedents in holding, in conflict with several other federal courts of appeals, that there is a common law "special circumstances" exception to the Prison Litigation Reform Act that relieves an inmate of his mandatory obligation to exhaust administrative remedies when the inmate erroneously believes that he has satisfied exhaustion by participating in an internal investigation?

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INTRODUCTION AND INTEREST OF *AMICI CURIAE*

Amici curiae—the States of West Virginia, Alabama, Alaska, Arizona, Arkansas, Colorado, Connecticut, Florida, Georgia, Hawaii, Idaho, Indiana, Iowa, Kansas, Kentucky, Louisiana, Maine, Michigan, Mississippi, Montana, Nebraska, Nevada, New Hampshire, New Mexico, North Carolina, North Dakota, Ohio, Oklahoma, Oregon, Pennsylvania, Rhode Island, South Carolina, Tennessee, Texas, Utah, Virginia, Washington, Wisconsin, and Wyoming—submit this brief in support of Petitioner because the Fourth Circuit's exception to the exhaustion requirement of the Prison Litigation Reform Act ("PLRA") will have a significant negative impact on States if adopted by this Court. In the decision below, the Fourth Circuit concluded that the exhaustion requirement is "not absolute." *Blake v. Ross*, 787 F.3d 693, 698 (4th Cir. 2015). And it adopted a judicially created exception for circumstances where a court finds a prison's administrative grievance procedures "ambiguous" and a prisoner reasonably believes he or she has exhausted all administrative remedies. *Id.* at 699.

Petitioner has well explained that the Fourth Circuit's exception contravenes this Court's established precedent regarding the PLRA's exhaustion requirement. Among other arguments, the exception is inconsistent with *Booth v. Churner*, 532 U.S. 731 (2001), in which this Court "stress[ed]"

that it "will not read futility or other exceptions into statutory exhaustion requirements where Congress has provided otherwise." *Id.* at 741 n.6. It runs afoul of *Jones v. Bock*, 549 U.S. 199 (2007), in which this Court cautioned lower courts against "read[ing] in" to the PLRA exceptions "by way of creation." *Id.* at 216. It conflicts with *Woodford v. Ngo*, 548 U.S. 81 (2007), which held that substantial compliance with prison regulations cannot suffice. And it cannot be squared with this Court's acknowledgment in *Porter v. Nussle*, 534 U.S. 516 (2002), and other cases that the federal courts no longer have discretion to dispense with exhaustion in the "interests of justice" to determine whether administrative remedies are sufficiently "plain, speedy, and effective." *Id.* at 524.

The *amici* States will not repeat those arguments, but submit this brief instead to highlight the benefits of the PLRA's exhaustion requirement, and to explain how the Fourth Circuit's judicially created exception to that requirement will undermine those benefits.

SUMMARY OF ARGUMENT

As this Court has recognized, one of the primary purposes of the PLRA was to promote efficiency by "reduc[ing] the quantity and improve[ing] the quality of prisoner suits." *Nussle*, 534 U.S. at 524. The PLRA's exhaustion requirement achieves these ends by "filter[ing] out the bad claims and facilitat[ing] consideration of the good." *Jones*, 549 U.S. at 204.

Administrative grievance proceedings can provide quick relief to prisoners with meritorious claims; the "informality and relative simplicity of prison grievance systems" are comparatively easier to navigate than the "numerous unforgiving deadlines and other procedural requirements" that confront *pro se* prisoners in federal court. *Woodford v. Ngo*, 548 U.S. 81, 103 (2006). Such proceedings also efficiently weed out frivolous claims, and ensure the creation of an administrative record for those matters that do end up in court.

These features of administrative exhaustion—ease of accessibility for prisoners, speed, thorough and timely investigation, and the efficient filtering of claims—are reflected in the administrative grievance procedures being used by States today. As shown below in a review of the procedures being used in five States, existing prison grievance procedures are designed to be simple and accessible for inmates. They also universally require review on a relatively speedy schedule, mandate investigation and a written response, and are successful in reducing the number of claims that go to court.

The Fourth Circuit's exception to the PLRA's exhaustion requirement will undermine these real-world benefits. If this Court adopts the Fourth Circuit's exception, every prisoner with a grievance who has failed to exhaust, or does not wish to exhaust, will have an incentive to file in court and take a chance on arguing that he or she found the

State's administrative grievance procedures to be confusing. There will be many more petitions, and they will lack the benefit of having had a record developed through an administrative process. Moreover, a greater number of prisoner petitions will survive dismissal for failure to exhaust and will proceed to summary judgment or trial. Finally, under the Fourth Circuit's approach, there are likely to be less—not more—accessible procedures for inmate grievances. State departments of corrections may be forced to add unnecessary and complicating detail to currently straightforward inmate grievance procedures in an effort to "anticipate every potential misunderstanding that an inmate might have about a prison's administrative remedies and then foreclose every imaginable misunderstanding in writing." *Blake*, 787 F.3d at 705 (Agee, J., dissenting).

ARGUMENT

I. State Administrative Grievance Procedures Reflect The Benefits Attributed By This Court To The PLRA's Exhaustion Requirement.

A. Any requirement of exhaustion of administrative remedies serves "two main purposes." *Woodford*, 548 U.S. at 89 (citing *McCarthy v. Madigan*, 503 U.S. 140, 145 (1992)). *First*, it "protects administrative agency authority" by giving an agency "an opportunity to correct its own mistakes with respect to the programs it administers before it is haled into federal court." *Woodford*, 548 U.S. at 89 (internal quotations omitted). *Second*,

"exhaustion promotes efficiency." *Ibid.*

In the context of the PLRA, this Court has stressed the importance of the second main purpose of promoting efficiency. It is "[b]eyond doubt" that Congress enacted the PLRA's exhaustion requirement to "reduce the quantity and improve the quality of prisoner suits." *Porter v. Nussle*, 534 U.S. 516, 524 (2002). Indeed, the PLRA's "invigorated" exhaustion requirement was a "centerpiece" of Congress's effort to bring "a sharp rise in prisoner litigation" "under control." *Woodford*, 548 U.S. at 84 (internal quotations omitted); see also *Anderson v. XYZ Corr. Health Servs., Inc.*, 407 F.3d 674, 676 (4th Cir. 2005) (noting that at the time of the PLRA's enactment, "an ever-growing number of prison-condition lawsuits were threatening to overwhelm the capacity of the federal judiciary").

As this Court has explained, the PLRA's exhaustion requirement achieves greater efficiency in part by reducing the number of prisoner lawsuits. "Claims generally can be resolved much more quickly and economically in proceedings before an agency than in litigation in federal court." *Woodford*, 548 U.S. at 89. This "reduces the quantity of prisoner suits because some prisoners are successful in the administrative process, and others are persuaded by the proceedings not to file an action in federal court." *Id.* at 94; see also *id.* at 89; *Nussle*, 534 U.S. at 525; *McCarthy*, 503 U.S. at 145. In other words, the exhaustion requirement will "filter out the bad claims and facilitate consideration of the good,"

Jones, 549 U.S. at 204, thus helping to address "the challenge [of] ensuring that the flood of nonmeritorious claims does not submerge and effectively preclude consideration of the allegations with merit," *id.* at 203.

Greater efficiency is also achieved in those prisoner lawsuits that do go to court. "[F]or cases ultimately brought to court, adjudication could be facilitated by an administrative record that clarifies the contours of the controversy." *Nussle*, 534 U.S. at 525. "[P]roper exhaustion improves the quality of those prisoner suits that are eventually filed because proper exhaustion often results in the creation of an administrative record that is helpful to the court." *Woodford*, 548 U.S. at 95; see also *McCarthy*, 503 U.S. at 145. The speed of administrative proceedings is particularly critical to prisoners' ability to produce useful records. "When a grievance is filed shortly after the event giving rise to the grievance, witnesses can be identified and questioned while memories are still fresh, and evidence can be gathered and preserved." *Woodford*, 548 U.S. at 95.

While some have suggested that the PLRA's exhaustion requirement "will lead prison administrators to devise procedural requirements that are designed to trap unwary prisoners [in order to] defeat their claims," this Court has rightly refused to entertain such "speculati[on]." *Id.* at 102. To the contrary, this Court has observed that "[c]orrections officials concerned about maintaining order in their institutions have a reason for creating

and retaining grievance systems that provide—and that are perceived by prisoners as providing—a meaningful opportunity for prisoners to raise meritorious grievances." *Ibid.* Moreover, the "informality and relative simplicity of prison grievance systems" are comparatively easier to navigate the "numerous unforgiving deadlines and other procedural requirements" that confront *pro se* prisoners in federal court. *Id.* at 103.

B. These features of administrative exhaustion—ease of accessibility for prisoners, speed, thorough and timely investigation, and the efficient filtering of claims—are reflected in the administrative grievance procedures being used by States today. By way of illustration, *amici* review below the procedures from five States: West Virginia, Colorado, Michigan, Florida, and Texas.

1. In West Virginia, inmate grievance procedures are set forth in an eleven-page policy directive of the Division of Corrections ("WV DOC") that provides a streamlined and accessible process to all inmates. Filing a grievance requires only the submission of a standard one-page "grievance form," copies of which "shall be made available to members of the inmate population at all institutions/facilities/centers." See Inmate Grievance Procedures, Policy Directive No. 335.00 at 5-6 (W.V. Div. of Corr. August 1, 2013). "At a minimum, grievance forms shall be available in all inmate housing units and the law libraries." *Ibid.* As a general rule, the policy directive instructs that inmates are "not to be told that an issue is not

'grievable.'" *Id.* at 5. And inmates are usually given an opportunity to correct procedurally defective grievance forms. "Except for grievances rejected due to having been previously addressed in a grievance or those filed beyond the time limits to file a grievance, inmate[s] shall have five (5) days to correct [a] defect and re-file a new grievance." *Id.* at 6.

The WV DOC's procedures are specifically designed to resolve grievances quickly. An inmate has 15 days from the date of the aggrieved conduct to file a formal grievance with his or her Unit Manager. *Id.* at 5-6. The Unit Manager has 5 days to investigate and answer those grievances properly filed, and an inmate then has 5 days to appeal to the Warden. *Id.* at 7. The Warden has 5 days to resolve the appeal, and if the inmate remains unsatisfied, the inmate has 5 days to appeal to the Commissioner. *Id.* at 7-8. The Commissioner will review the grievance for grounds for rejection, and provide a written answer within 10 days. *Id.* at 8-9. In total, grievances are to be resolved within 45 days.

There are also built-in contingencies to ensure timely review in unusual circumstances. If relevant prison officials miss their deadlines for responding to the grievance or an appeal, an inmate is permitted to "treat the non-response as a denial of his/her grievance." *Id.* at 7; see also *id.* at 8. And in cases where an inmate is alleging that he or she is subject to "a substantial risk of imminent sexual abuse," the inmate is permitted to file a grievance directly with

the Warden, who must make an initial response within 48 hours and issue a final written response within 5 calendar days. *Id.* at 10.

In addition, the procedures ensure a timely investigation by prison officials. After a grievance is initially filed, the Unit Manager is responsible for logging and tracking the grievance, investigating the allegations, and providing an answer within 5 days. *Id.* at 6. The policy directive requires that the answer be "clear, concise, complete, and professional." *Ibid.* As this Court has noted, such a timeframe ensures that "witnesses can be identified and questioned while memories are still fresh, and evidence can be gathered and preserved." *Woodford*, 548 U.S. at 95.

Finally, records show that the WV DOC's procedures are successful in efficiently winnowing claims, presumably because inmates are satisfied with the result or decide it is not worth pursuing their complaints. According to the WV DOC, on December 31, 2014 it housed approximately 5,867 inmates. It further reports that in 2014, there were a total of 10,244 grievances filed at the Unit Manager level, and of these grievances, only 4,070 were appealed to the Warden.

2. States with much larger prison populations than West Virginia—such as Colorado (17,954 inmates), Michigan (roughly 43,000 inmates), Florida (99,373 inmates), and Texas (146,984 inmates)—have grievance procedures that similarly

reflect the benefits of administrative exhaustion. [1]

a. In Colorado, inmate grievance procedures are set out in an eleven-page regulation of the Colorado Department of Corrections ("CO DOC"). It is the express policy of the CO DOC "to maintain a written grievance procedure that is made available to all offenders and that includes three levels of appeal." See Grievance Procedures, Regulation No. 850-04 at 1 (CO Dep't of Corr. March 15, 2015). The regulation requires that "[a]ll offenders [be] informed about how to access the grievance system," both "orally and in writing in a language that is easily understood by each offender." *Id.* at 2. To that end, "[a]ll offenders receive orientation to the grievance procedure, in an understandable and accessible format (i.e. language translation, sign language interpretation, audio/visual) within 30 calendar days of admission to DOC and subsequently during their facility specific orientation." *Ibid.* The grievance form is only one page long and simple in format. See DC Form 85004B (CO Dep't of Corr., March 15, 2015).

Like in West Virginia, there are procedural protections in place for the inmates. Offenders are generally given an opportunity to "cure" a

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[1] See CO. Dep't of Corr., Monthly Population and Capacity Report, (April 30, 2015); MI Dep't of Corr., Prison Population Projection Report (Feb. 2015); 42-43, http://www.dc.state.fl.us/pub/pop/monthly/#pop (last visited Jan. 14, 2016); TX Dep't of Corr. of Crim. Justice, Statistical Report FY 2014.

"procedurally deficient" grievance, *id.* at 3, and "[o]ffenders who require an accommodation to file a grievance, or who are otherwise unable to complete the grievance form are authorized to obtain assistance from other offenders, if the assistance requested does not interfere with the security of the facility," *ibid.* Although certain issues are considered non-grievable, even grievances that raise such issues are not simply dismissed outright. "Grievances filed requesting review of non-grievable issues listed above shall be informally discussed with the offender by staff and documented appropriately in the offender chronological record." *Id.* at 5. Finally, though inmates may face restrictions if they file "multiple, frivolous grievances in a short period of time," *id.* at 9, the regulation specifically provides that "[r]eprisals for the good faith use of or participation in the grievance procedure are prohibited," *id.* at 2.

The CO DOC's administrative grievance procedures also provide for relatively speedy review. Inmates must attempt an informal resolution of a grievance prior to seeking formal administrative review, *id.* at 2, but in any event, any formal grievance must be filed within 30 calendar days of the aggrieved incident, *id.* at 8. The case manager has 25 days to respond, after which an inmate has 5 days to appeal to the "administrative head or designee," who then has 25 days to review and answer. *Id.* at 7-8. If the inmate remains unsatisfied, he or she has 5 days to appeal to the grievance officer, who has 45 days to review. *Ibid.*

In total, grievances are generally to be resolved within 135 days. "In the event the time limit concerning any step of the process expires without a response, the offender may proceed to the next step within five calendar days of the date the response was due." *Id.* at 8. And where "there are indications of potential and substantial risk to the life or safety of the offender, or when irreparable harm to the offender's health is imminent," a written response documenting a remedy "must be rendered within three business days." *Id.* at 9.

Finally, the procedures specifically require detailed tracking of any grievance, as well as thorough investigation. "Grievance coordinators shall log and scan each grievance received into the electronic grievance database, route, and track each grievance filed with their facility." *Id.* at 4. And "DOC employees, contract workers, volunteers, or the grievance officer" are expressly instructed to "sufficiently investigate the circumstances surrounding the problem or complaint and the meaningful remedy requested to formulate a meaningful response." *Id.* at 6. To ensure a complete investigation, the procedures contemplate that "[w]hen a good faith investigation into the issue alleged in the grievance will proceed past the time limitation," corrections officials will timely notify the inmate in writing. *Id.* at 8.

b. The Michigan Department of Corrections ("MDOC") sets forth its administrative remedy procedures in a seven-page policy directive that

likewise includes measures to make the process accessible to inmates. Prison officials are instructed to "ensure prisoners and parolees are provided assistance in completing a grievance form, if needed." See Prisoner/Parolee Grievances, Policy Directive No. 03.02.130 at 3 (MI Dep't of Corr. July 9, 2007). Moreover, for certain facilities, "grievances shall not be rejected or denied solely because the prisoner has not included with his/her grievance exhibits or other documents related to the grievance." *Id.* at 2. Instead, "[i]f the grievance references documents and those documents are not in the prisoner's files or otherwise available to the grievance coordinator or respondent except through the prisoner, the documents shall be reviewed with the prisoner as part of the grievance investigation process." *Ibid.* And if a copy of a document is needed for the grievance investigation, "the copy shall be made at Department expense." *Ibid.* Further, it is specified that "[a] grievant shall not be penalized in any way for filing a grievance except as provided in this policy for misusing the grievance process," and corrections staff are expressly required to "avoid any action that gives the appearance of reprisal for using the grievance process." *Id.* at 2-3.

The MDOC's three levels of review "shall generally be completed within 120 calendar days." *Id.* at 4. An inmate must first "attempt to resolve the issue with the staff member involved within two business days after becoming aware of a grievable issue," *id.* at 3, and then has 5 days thereafter to file a formal grievance with a Step I grievance

coordinator, *id.* at 4. If the grievance is accepted, a response must be given within 15 days after receipt of the grievance. *Id.* at 4-5. The inmate may appeal the response to a Step II grievance coordinator within 10 days of receiving the response, and an answer to that appeal is due within 15 days. *Ibid.* The inmate then has 10 business days to further appeal. *Ibid.*

As in other States, built-in contingencies ensure timely review. Although extensions may be granted for DOC officials to respond, those extensions are limited in almost all circumstances to 15 business days. *Id.* at 4. Moreover, if a grievant does not receive a response "within required time frames, including any extensions granted, the grievant may forward the grievance to the next step of the grievance process within ten business days after the response deadline expired, including any extensions which have been granted." *Ibid.* And issues "of an emergent nature" may be handled on an expedited basis. *Id.* at 5.

There are also express requirements for tracking grievances and ensuring a thorough investigation. "The Grievance Coordinator shall log and assign a unique identifying number to each Step I grievance received, including those which may be rejected." *Id.* at 4. The Grievance Coordinator is also responsible for ensuring "a thorough investigation was completed for each Step I grievance accepted," which includes permitting an interview of the grievant to allow the grievant to "explain the grievance more completely"

and "to identify and gather any additional information needed to respond to the grievance." *Id.* at 5. The procedures also mandate that at Step II, "[t]he Grievance Coordinator shall ensure that any additional investigation was completed as necessary." *Id.* at 6.

c. The grievance procedures of the Florida Department of Corrections ("FL DOC") are similar to the others. A copy of the rules is made available "for access by inmates at a minimum in the inmate library and from the housing officer of any confinement unit." Fla. Admin. Code Ann. r. 33-103.015(10). The rules specifically allow inmates "to seek assistance from other inmates or staff members in completing the grievance forms as long as the assistance requested does not interfere with the security and order of the institution." Fla. Admin. Code Ann. r. 33-103.015. And "[w]riting paper and writing utensils shall be provided to those inmates who have insufficient funds in their accounts at the time the materials are requested if such are needed to prepare the grievance or grievance appeal." *Ibid.* Submission of grievances is made easy as well. Grievances (and any appeals) are to be placed in locked grievance boxes, which "shall be available to inmates in open population and special housing units." Fla. Admin. Code Ann. r. 33-103.006.

Various other measures further ensure that inmates have access to the grievance process. Subject to certain exceptions, an inmate who has a grievance returned to him or her "may refile utilizing

the proper procedure or correct the stated deficiency and refile if upon receipt of this notification the filing is within time frames allowable." Fla. Admin. Code Ann. r. 33-103.014. The procedures also expressly state that "[i]nmates shall be allowed access to the grievance process without hindrance," and that "[s]taff found to be obstructing an inmate's access to the grievance process shall be subject to disciplinary action ranging from oral reprimand up to dismissal." Fla. Admin. Code Ann. r. 33-103.017. And finally, the grievance procedures are subject to periodic operational reviews that involve a "survey of staff and inmates, review of employees' and inmates' comments on the effectiveness and credibility of the procedure, on-site visits to institutions and facilities." Fla. Admin. Code r. 33-103.018.

The procedures are designed to resolve inmate grievances within 110 days. Most inmates must first seek informal review of their grievance within 20 days of the occurrence, Fla. Admin. Code Ann. r. 33-103.011(1)(a), 33-103.005, to which a written response is due within 10 days, Fla. Admin. Code Ann. r. 33-103.005(4), 33-103.011(3)(a); see Fla. Admin. Code Ann. r. 33-103.002(15)(a). If the inmate is not satisfied after the informal review, he or she has 15 days from the date of the informal disposition to submit a formal grievance. Fla. Admin. Code Ann. r. 33-103.011(b)(1).[2] A response to any formal

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[2] Those inmates whose grievances fall under the limited exceptions to the informal review requirement must seek a formal review within 15 days of the aggrieved incident. Fla.

grievance is due within 20 days, Fla. Admin. Code Ann. r. 33-103.006(6). Fla. Admin. Code Ann. r. 33-103.011(3)(b); see Fla. Admin. Code Ann. r. 33-103.002(15)(b). Any appeal must be submitted to the FL DOC's Office of the Secretary within 15 days from receipt of the response. Fla. Admin. Code r. 33-103.007, 33-103.011(1)(c). The Bureau of Policy Management and Inmate Appeals must then conduct an "appropriate investigation and evaluation" and submit a response to the inmate within 30 days. Fla. Admin. Code r. 33-103.007(4)(e) & (f), 33-103.011(3)(c).

All grievances must be tracked and fully investigated, including in some cases through the solicitation of comments from other inmates. "The institutional grievance coordinator shall log all formal grievances and provide the inmates with receipts." Fla. Admin. Code Ann. r. 33-103.006. The procedures explicitly state that Responses to grievances are to be provided "[f]ollowing investigation and evaluation," and "[t]he degree of investigation is determined by the complexity of the issue and the content of the grievance." Fla. Admin. Code Ann. r. 33-103.006. FL DOC also has a process for "solicitation of written comments by inmates and employees on selected formal inmate grievances that staff determine will significantly impact the inmate population and which challenge general procedures and practices prior to the initial adjudication of the

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Admin. Code Ann. r. 33-103.011(b)(2), 33-103.006.

grievance." Fla. Admin. Code Ann. r. 33-103.004. In those circumstances, "[e]ach institution shall within 5 calendar days of receipt, post copies of this type of formal grievance on inmate and employee bulletin boards, circulate among all inmates in all disciplinary, administrative, and close management areas, including all inmates under sentence of death." *Ibid.*

d. Lastly, the administrative grievance procedures in Texas are set forth in several very succinct one- to two-page formats that are made widely available to inmates. As explained by the Texas Department of Criminal Justice, Administrative Review and Risk Management Division ("TDCJ"), the Offender Grievance Program is designed "[t]o promote awareness and positive intervention between staff and offenders, to identify and resolve issues at the lowest possible level, and to facilitate the flow of information between the units and agency leaders." Tex. Dep't of Criminal Justice, *Offender Grievance Program*, http://www.tdcj.state.tx.us/divisions/arrm/arrm_res_grievance.html (last visited Jan. 14, 2016). The program "offers the offender a less formal alternative to litigation, thus saving taxpayers the cost of defending the agency in court." See Offender Grievance Program pamphlet, (TX Dep't of Criminal Justice, Offender Grievance Program, Jan. 1, 2015). Grievance forms "are available from the law library, housing area, shift supervisors, or by contacting the unit grievance office," and they may either be placed in a "grievance box" or "hand[ed] directly to the grievance

investigator on [the inmate's] unit." See Offender Grievance Manual, App. B (TX Dep't of Criminal Justice, June 2015). Moreover, "instructions on how to write and submit grievance[s] are posted in house areas, law libraries, and high traffic areas of the unit, such as hallways, and dining halls." See Offender Grievance Program pamphlet. And in most cases, if a grievance is returned as defective, it "may be corrected and resubmitted within 15 days from the signature date on the returned grievance." Offender Grievance Manual.

The two-step process generally takes no more than 100 days for non-medical grievances and 105 days for medical grievances. Inmates are required first to attempt to resolve their grievances informally, and then have 15 days from the date of the aggrieved incident to file a Step 1 grievance with a unit grievance coordinator. *Ibid.* The unit grievance coordinator has 40 days to investigate and respond. *Ibid.* If the inmate is not satisfied, he or she has 15 days from "the Step 1 signature" to appeal to Step 2. *Ibid.* The Central Grievance Office then has 40 days to investigate and respond to a non-medical grievance, and 45 days for medical grievances. See Offender Grievance Manual, Offender Grievance Program pamphlet. To ensure a thorough investigation, the procedures reserve the possibility of an extension of the deadlines. See Offender Grievance Manual.

Statistics show that the TDCJ Offender Grievance Progam has been effective at reducing

claims before they reach federal court. In FY 2014, there were a "combined 249,686 Step 1 and Step 2 grievances" filed by inmates in its units, and only about 26% of all Step 1 grievances were appealed to the second step." See Offender Grievance Program pamphlet.

II. The Fourth Circuit's Decision Will Burden States And Federal District Courts With Increased And Lower Quality Prisoner Litigation.

A. The benefits of the PLRA's exhaustion requirement would be quickly eroded under the Fourth Circuit's exception. Like the exception this Court rejected in *Woodford*, the Fourth Circuit's exception here "would make the PLRA exhaustion scheme wholly ineffective." 548 U.S. at 95. As this Court observed in *Woodford*, "[a] prisoner who does not want to participate in the prison grievance system will have little incentive to comply with the system's procedural rules unless noncompliance carries a sanction, and under [the Fourth Circuit's] interpretation of the PLRA noncompliance carries no significant sanction." *Ibid.*

In the case below, the Fourth Circuit turned the exhaustion requirement into "a largely useless appendage." *Id.* at 93. The court excused Blake's failure to exhaust the prison's administrative process, even though Blake admitted that he had not read all of the prison's materials relating to the administrative process. The court found that the

prison's materials were confusing simply because they did not *specifically* contradict Blake's particular, alleged misunderstanding.[3] And the court determined that the prison administrators had sufficient opportunity to develop an administrative record, even though Blake did not initiate any procedures with the prison, requested at one point that the investigation be closed, and expressly disavowed any intent to sue anyone. 787 F.3d at 704-05. (Agee, J., dissenting).

B. 1. There can be no doubt that prisoners throughout the country will see a court's adoption of the Fourth Circuit's approach as an invitation to file suit even where they have clearly failed—or, as in this case, never attempted—to follow their prisons' administrative procedures. As this Court has said, "exhaustion requirements are designed to deal with parties who do not want to exhaust," which tends to be the case with prisoners. *Woodford*, 548 U.S. at 90; see also *id.* at 89 ("Statutes requiring exhaustion serve a purpose when a significant number of aggrieved parties, if given the choice, would not

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[3] Contrary to the majority's conclusion, like the procedures outlined above, Maryland's grievance procedures were not ambiguous or otherwise confusing. *Blake*, 787 F.3d at 702 (Agee, J., dissenting). As Judge Agee explained in his dissent, "[o]ne can hardly imagine a plainer provision that more directly applies to Blake's present claim," as Maryland's procedures "specifically instruct[] prisoners to use the [administrative remedy procedure] to 'seek relief ... for issues that include ... [u]se of force.'" *Id.* at 702.

voluntarily exhaust."); *Doe v. Washington Cnty.*, 150 F.3d 920, 924 (8th Cir. 1998) ("The PLRA was designed to discourage the initiation of litigation by a certain class of individuals—prisoners—that is otherwise motivated to bring frivolous complaints as a means of gaining a short sabbatical in the nearest Federal courthouse." (internal quotation marks omitted)). The inevitable result of the Fourth Circuit's broad exception will be the very scenario the PLRA was meant to prevent—the inundation of federal district courts with undeveloped and potentially nonmeritorious prisoner complaints. Every prisoner with a grievance who has failed to exhaust, or does not wish to exhaust, would have an incentive to file in court and take a chance on arguing that his or her State's administrative grievance procedures are confusing.

Given the success of the PLRA in reducing claims that go to court, it is not difficult to imagine the potential increased burden on federal district courts and the States that face such lawsuits. As the statistics from just three States show, the PLRA's exhaustion requirement has been effective in limiting the number of suits filed by prisoners in federal court. The number of suits filed in federal court has been small compared to the number of administrative grievances, which in turn has been small compared to the total number of state prisoners. The flip side of this effectiveness, however, is the potential for a significantly greater number of filings in court if this Court adopts the Fourth Circuit's rule.

In West Virginia, for example, there were approximately 6,973 inmates housed in its facilities on December 31, 2013. That same year, there were approximately 1,505 prisoner grievances and disciplinary actions appealed to the Commissioner in accordance with the WV DOC administrative review procedures, and only 164 prisoner petitions alleging civil rights or prison condition issues filed in the Northern and Southern Districts of West Virginia by WV DOC inmates. See U.S. District Courts-Civil Cases Commenced, by Nature of Suit and District, During the 12-Month Period Ending Sept. 30, 2014, Table C-3, http://www.uscourts.gov/statistics/table/c-3/judicial-business/2014/09/30 (last visited Feb. 2, 2016).

Similarly, Maryland's Division of Corrections ("MD DOC") housed approximately 21,500 inmates in its correctional facilities. In calendar year 2013, the MD DOC received approximately 20,193 formal prisoner complaints through its Administrative Remedy Procedure, which are reviewed and resolved by the warden. See also Pet. App. at 77-81. Of these formal complaints, approximately 2,452 were appealed to the Commissioner, and then approximately 2,321 were appealed to the Inmate Grievance Office, which is the final step in the administrative review process. The Administrative Office of the U.S. Courts reports that in fiscal year 2013-2014, MD DOC inmates ultimately filed 489 prisoner petitions in the District of Maryland alleging civil rights or prison condition issues. *Ibid.*

Finally, over the same time period in North Carolina, according to the North Carolina Department of Public Safety ("NCDPS"), there were approximately 37,319 inmates as of January 1, 2014. That year, the NCDPS Inmate Grievance Resolution Board, which oversees the final step in the State's administrative review procedures, received approximately 14,654 grievances. And ultimately, the federal courts report that there were 697 prisoner petitions from NCDPS inmates pending in the U.S. District Courts for the Eastern, Middle, and Western Districts of North Carolina that alleged civil rights or prison condition issues. *Ibid.*

The increased burden on the system will come not only from a greater number of filings in court, but also from a greater number of prisoner petitions that survive dismissal for failure to exhaust and proceed to summary judgment or trial. Consider for example that from January 1, 2014 through September 2015, according to Maryland's internal database, the District of Maryland dismissed in whole or in part for failure to exhaust approximately 53% of the prisoner civil rights suits in which the court addressed the exhaustion defense raised by the Office of the Attorney General of Maryland. Under the Fourth Circuit's new exception, at least some of these petitions would have survived dismissal and proceeded to summary judgment or trial, creating an additional burden on both the District of Maryland and the Maryland Attorney General's Office.

2. The Fourth Circuit's exception is also likely to

result in less—not more—accessible procedures for inmate grievances. Under the Fourth Circuit's approach, the burden is on state corrections agencies to produce materials that affirmatively "contradict [an inmate's] belief that he had exhausted his administrative remedies." *Blake*, 787 F.3d at 700. The foreseeable consequence of this requirement is the convolution of what have until now been straightforward and accessible inmate grievance procedures.

As set forth above, existing prison grievance procedures are currently designed to be simple and accessible for inmates. Grievance forms tend to be a single, uncomplicated form. Assistance is often available. And prisoners who file defective grievances are usually permitted to correct the defects and resubmit the forms.

But as Judge Agee explained in dissent below, "jail officials [now] must anticipate every potential misunderstanding that an inmate might have about a prison's administrative remedies and then foreclose every imaginable misunderstanding in writing." *Id.* at 705 (Agee, J., dissenting). That is "a substantial new burden on state corrections officials," *ibid.*, and may force prisons to adopt convoluted and increasingly voluminous procedural rules, laden with unnecessary detail. The increased complexity may then lead to more inmates who claim confusion, which will in turn require even more detail, creating a vicious cycle that benefits neither prisoners nor prison administrators and undermines the very

purpose of the PLRA.

CONCLUSION

The decision below should be reversed.

Respectfully submitted,

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